United Overseas Bank (M) Bhd v Natural Stationery Industries Sdn Bhd and another suit

HIGH COURT (KUALA LUMPUR) — CIVIL SUITS NO D2–22–389 OF 1998 AND D2–22–272 OF 1998
ABDUL AZIZ J
29 FEBRUARY 2000

Banking *— Banks and banking business — Forward foreign exchange contracts — Cancellation of — Whether defendant liable for bank's losses on outstanding forward contracts —Bills of exchange purchased credit facilitie used by bank to honour forward contracts —Whether defendant obliged to present its bills for collection by bank and proceeds thereof to be appropriated towards settlement of bank's losses on forward contracts — Whether forward contracts were illegal and unenforceable being in violation of para 5 of Exchange Control of Malaysia Notice No 2 — Tes' applicable*

Natural Stationery Industries Sdn Bhd ('the company'), an exporter of goods, has at all material times been a customer of United Overseas Bank (M) Bhd ('the bank'). The bank has been granting the company bills of exchange purchased credit facilities ('BEP facilities') since 1995. Throughout 1996 and 1997, at the company's request, the bank entered into a number of forward foreign exchange contracts ('forward contracts') with the company. The company had been honouring the forward contracts until the end of 1997 when they informed the bank that were unable to perform one of the outstanding contracts and asked that it be cancelled. That was followed by a letter from the company's solicitor to the bank denying that the company was liable to perform the outstanding forward contracts. As a result, the bank cancelled all forwards contracts that had fallen due and instituted their action against the company to recover their losses arising from the company's refusal to perform 16 forward contracts. There was no legal nexus between a BEP facility transaction and a forward contract. They were two independent and separate arrangements. But it was the bank's case that the company had been honouring forward contracts mostly from the proceeds of bills presented to the bank pursuant to the BEP facilities granted to the company. In the present application, the bank sought several injunctive orders pertaining to the company's bill. The company's case was primarily that all the forward contracts that they entered into were invalid and not binding on them and therefore they were not liable to the bank for the losses the bank had incurred on the outstanding forward contracts. It was submitted that: (i) there was false representation by the bank; and (ii) the forward contracts were illegal and unenforceable being in violation of para 5 of the Exchange Control of Malaysia Notice No 2 ('ECM 2'). The company contended that when entering into the forward contracts, the bank failed to satisfy the condition in para 5.1.1 of ECM 2 which requires them to be 'satisfied' that the company was due to receive foreign currency for the export of goods. It was contended that the bank could not be so satisfied except upon actual production by the company of

export documents. The company sought for several injunctive orders against the bank. A

Held:

(1) The court ought not to not grant the injunctive orders sought by the bank unless there was at least an arguable case that the bank was entitled to expect that so long as there were outstanding forward contracts, the company would present all their bills to the bank. There was, however, no such arguable case. The bank had not said that they agreed to enter into forward contracts with the company in the belief or on the understanding that the company would continue to present their bills to the bank. Therefore, the bank's application was dismissed (see p 749D–E). B C

(2) Based on the evidence adduced, the court found that the allegation that the company entered into the forward contracts as a result of false representations on the part of the bank was unfounded (see p 751C). D

(3) By virtue of s 4(1) of the Exchange Control Act 1953, the bank as an authorized dealer does not need the permission of the Controller to buy or sell any foreign currency. In the circumstances, the conditions attached to the granting of the permission were not applicable to the bank. Therefore, para 5 of ECM 2 was ineffective and unenforceable (see pp 752I–753A). E

(4) If the intention of para 5.1 was that the bank must be satisfied from the actual production of the related bill, it would have said so. Paragraph 5.1 not being specific as to the basis for being 'satisfied', there would be no justification for construing the provision as requiring a specific basis for it. Therefore, the test to be applied was a subjective one, and there was no failure on the part of the bank to be so satisfied basing on the past performance record of the company (see pp 753H–754A). F

(5) The court found that there was no serious question to be tried as to the validity of the forward contracts and the company was therefore not qualified for the injunctive orders that they sought (see p 754I). G

[Bahasa Malaysia summary

Natural Stationery Industries Sdn Bhd ('syarikat tersebut'), suatu pengeksport barangan, pada semua masa matan adalah pelanggan United Overseas Bank (M) Bhd ('bank tersebut'). Bank tersebut telah memberikan syarikat kemudahan kredit belian bil pertukaran ('kemudahan BEP') sejak 1995. Sepanjang 1996 dan 1997, di atas permintaan syarikat tersebut, bank tersebut telah memasuki beberapa kontrak pertukaran asing hadapan (forward foreign exchange contracts) ('kontrak hadapan') dengan syarikat tersebut. Syarikat tersebut telah membayar kontrak hadapan tersebut sehingga akhir H I

1997 apabila mereka memberitahu bank bahawa mereka tidak dapat melaksanakan salah satu daripada baki kontrak hadapan tersebut. Ini diikuti oleh surat daripada peguam syarikat kepada peguam yang menafikan bahawa syarikat adalah bertanggungan untuk melaksanakan baki kontrak hadapan tersebut. Ini menyebabkan bank tersebut membatalkan semua kontrak-kontrak yang sudah sampai masa untuk dibayar dan membawa tindakan terhadap syarikat tersebut untuk mendapat kembali kerugian yang timbul daripada keengganan untuk melaksanakan 16 kontrak hadapan tersebut. Tiada hubungan undang-undang antara kemudahan transaksi BEP dan suatu kontrak hadapan. Ia adalah dua penentuan yang bebas dan berbeza. Tetapi ia adalah kes bagi pihak bank bahawa syarikat telah menunaikan semua kontrak hadapan kebanyakan daripada keuntungan bil-bil yang dikemukakan kepada bank menurut kemudahan BEP yang diberikan kepada syarikat. Di dalam permohonan ini, bank telah memohon beberapa perintah injunksi berkenaan dengan bil syarikat. Hujahan syarikat pada asasnya adalah bahawa semua kontrak hadapan yang mereka telah masuki adalah tidak sah dan tidak mengikat mereka dan oleh itu mereka tidak bertanggungan kepada bank untuk kerugian yang bank telah alami di atas baki kontrak hadapan. Adalah dihujahkan bahawa: (i) terdapat salah nyata oleh bank; dan (ii) kontrak hadapan adalah tidak sah dan tidak boleh dikuatkuasakan kerana melanggar perenggan 5 Kawalan Pertukatan Malaysia No 2 ('ECM 2'). Syarikat tersebut menegaskan apabila memasuki kontrak hadapan tersebut, bank tersebut gagal untuk memuaskan syarat perenggan 5.1.1 ECM 2 tersebut yang memerlukan mereka untuk 'berpuas hati' bahawa syarikat tersebut akan menerima pertukaran asing untuk mengeksport barang-barang. Adalah dihujahkan bahawa bank tersebut tidak boleh berpuas hati kecuali di atas pengemukaan sebenar oleh syarikat berkenaan dengan dokumen-dokumen eksport. Syarikat telah memohon beberapa perintah injunksi terhadap bank tersebut.

Diputuskan:

(1) Mahkamah tidak patut memberikan perintah injunksi yang dipohon oleh bank kecuali terdapat kes yang boleh dibicarakan bahawa bank berhak untuk mengharap bahawa selagi terdapat baki kontrak hadapan, syraikat akan mengemukakan semua bil-bil kepada bank. Namun, tiada kes yang boleh dibicarakan sedemikian. Bank tidak mengatakan bahawa mereka bersetuju untuk memasuki kontrak hadapan tersebut dengan syarikat tersebut atas kepercayaan atau pemahaman bahawa syarikat akan terus mengemukakan bil-bi kepada bank tersebut. Oleh itu, permohonan bank ditolak (see ms 749D–E).

(2) Berdasarkan keterangan yang dikemukakan, mahkamah mendapati yang pengataan bahawa syarikat tersebut memasuki kontrak hadapan tersebut atas akibat pernyataan palsu di pihak bank adalah tidak berasas (lihat ms 751C)

(3) Menurut s 4(1) Akta Kawalan Pertukaran Wang 1953, bank sebagai pengedar yang sah tidak perlukan kebenaran Penguasa untuk menjual dan membeli sebarang wang pertukaran asing. Di dalam keadaan-keadaan ini, syarat yang mengikat pemberian kebenaran tidak terpakai kepada bank. Oleh itu, perenggan 5 ECM 2 adalah tidak efektif dan tidak boleh dikuatkuasakan (lihat ms 752I–753A).

(4) Jika niat para 5.1 adalah bank mesti berpuas hati daripada pengemukaan sebenar bil yang berkaitan, ia akan menyatakan sebegitu. Kerana perenggan 5.1 tidak spesifik berkenaan dengan dasar untuk 'puas hati', tidak terdapat justifikasi untuk menafsirkan peruntukan sebagai memerlukan suatu dasar spesifik untuknya. Oleh itu, ujian yang terpakai adalah sesuatu yang subjektif, dan tidak terdapat kegagalan di pihak bank untuk berpuas hati sedemikian berdasarkan rekod perkembangan syarikat yang lampau (lihat ms 753H–754A).

(5) Mahkamah mendapati bahawa tidak terdapat persoalan serius untuk dibicarakan berkenaan dengan keesahan kontrak hadapan tersebut dan syarikat adalah tidak layak untuk mendapatkan perintah injunksi yang mereka pohon (lihat ms 754I).]

Notes

For cases on banks and banking business generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1306–1409.

Cases referred to

Aspatra Sdn Bhd & Ors v Bank Bumiputra (M) Bhd [1988] 1 MLJ 97 (refd)

Astro Exito SA v Southland Enterprise [1982] 3 All ER 335 (refd)

Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670 (refd)

Garden Cottage Foods Ltd v Milk Marketing Board [1984] 1 AC 130 (refd)

TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd [1985] 2 MLJ 45 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989

Bretton Woods Agreement s 2(b) of art VIII

Bretton Woods Agreements Act 1957 (Act 472)

Exchange Control Act 1953 ss 2(1), 4(1), 36, 39(1)

Exchange Control (Authorized Dealers in Foreign Currencies and Authorized Depositaries) (No 2) Order 1995 (PU (A) 432/95)

Exchange Control (Authorized Dealers in Foreign Currencies and Authorized Depositaries) Order 1998 (PU(A) 265/98

Exchange Control of Malaysia Notice No 2 para 5

SM Yoong (*Elaine Ong and Adrian Hii* with her) (*Shook Lin & Bok*) for the plaintiffs in Civil Suit No D2–22–389 of 1998 and the defendants in Civil Suit No D2–22–272 of 1998.

B Thangaraj (*Azad Bashir, Nizam Bashir, Alan Chan* and *M Loga* with him) (*Bashir & Co*) for the defendants in Civil Suit No D2–22–389 of 1998 and the plaintifffs in Civil Suit No D2–22–272 of 1998.

Cur Adv Vult

Abdul Aziz J: The transactions that are involved in these two suits began as transactions between one of the parties thereto, Natural Stationery Industries Sdn Bhd ('the company'), and Chung Khiaw Bank (M) Berhad, which bank, in 1997, was merged into United Overseas Bank (M) Bhd, the opposite party in these two suits. In this judgment I shall be referring only to the latter bank as if all transactions had been between that bank and the company, and I shall be referring to that bank as 'the bank'.

The case of the bank is briefly as follows. The company has at all material times been a customer of the bank and been operating a current account with the bank. The bank has been granting the company, an exporter of goods, Bills of Exchange Purchased credit facilities ('BEP facilities') since 1995.

According to the bank, the BEP facilities operated in relation to the company in the following manner. The company exported goods to parties overseas. For the company to obtain payment in foreign currency from an overseas party for goods exported, certain documents were necessary, such as bills of exchange, commercial invoices and bills of lading. For convenience, I shall refer to the document or documents necessary to obtain payment for a particular export as a 'bill'. The BEP facilities enabled the company to present any of their bills to the bank for the bank to collect the payment for the goods on the bill's maturity date. In return, the bank made an immediate payment to the company, which payment was treated by the bank as an advance. The understanding that I gain from explanatory material provided by the bank (or their solicitors) is that the amount paid by the bank was the face value of the bill, being the amount that the company expected to receive for the goods exported, say, USD100,000. According to the bank (see para 5(e) of encl (7) in suit 272), the payment was in Malaysian currency, being, according to the explanatory material, the equivalent of USD100,000 at the current or spot rate of exchange.

On the bill's maturity date, the bank should be able to collect USD100,000 from the exporter's overseas customer. Where the bank did collect, the money was the company's money, but the bank used it to settle the advance. Until the advance was settled, the bank charged interest on it. If the bill was dishonoured and the bank was unable to collect payment on it, the bank would have recourse to the company for repayment of the advance. The right of recourse was given by an indemnity given by the company to the bank by a document entitled 'Indemnity for bills facility'.

Throughout 1996 and 1997, at the company's request, the bank entered into a number of forward foreign exchange contracts ('forward

contracts') with the company. Such a contract was one by which, according to the bank, the company agreed to sell and deliver an agreed sum of a foreign currency to the bank and the bank agreed to buy the foreign currency and deliver to the company, on the maturity date, the Ringgit Malaysia equivalent of it at the contracted exchange rate. A

The company had been honouring the forward contracts partly or fully until the end of 1997, when they informed the bank that they were unable to perform one of the outstanding contracts and asked that it be cancelled. That was followed shortly after by a letter from the company's solicitors to the bank denying that the company was liable to perform the outstanding forward contracts. As a result, the bank cancelled all forward contracts that had fallen due and instituted their action, suit 389, against the company to recover their losses arising from the company's refusal to perform 16 forward contracts, and to claim interest thereon. The losses are in the form of the difference between the amount of Ringgit Malaysia that the bank would, at the contracted rate, have paid the company for the foreign currencies had the company honoured the forward contracts and the amount of Ringgit Malaysia that the bank would have obtained for the currencies on the date of cancellation of the forward contracts at the more favourable exchange rates prevailing at that date. The net amount of claimed losses is RM13,346,467.02. B C D

Now there is no legal nexus between a BEP facility transaction and a forward contract. They are two independent and separate arrangements. But it is the bank's case that the company had been honouring forward contracts mostly from the proceeds of bills presented to the bank pursuant to the BEP facilities granted to the company. In other words, the sums of foreign currencies that the company sold to the bank in the performance of forward contracts on the due dates mostly came from the proceeds of bills. Some were, however, direct remittances. E F

From the explanatory material mentioned earlier, my understanding of the operation of honouring of forward contracts by the proceeds of bills, in a simple case where one particular bill satisfies one particular forward contract, is as follows. I take as example the case of an exporter who expects to receive USD100,000 for the goods that he exports. He enters into a forward contract to sell USD100,000 to the bank for delivery in 60 days at the forward rate of RM2.40. At the date of maturity of the forward contract, the exporter presents to the bank the bill for USD100,000, which bill will mature, say, 30 days hence. The bank advances to the exporter USD100,000 on the bill. The exporter uses that USD100,000 to settle the forward contract by delivering it to the bank. At the rate of RM2.40 contracted for in the forward contract, the exporter gets RM240,000 for the USD100,000. Even though the prevailing rate then has gone down to, say, RM2.30, the exporter still gets RM240,000. If he had not entered into the forward contract, his USD100,000 will only be worth RM230,000. So by entering into the forward contract he is assured of getting RM240,000, the amount which, at the time of entering into the forward contract, both parties anticipated that USD100,000 should bring on the maturity date of the forward contract. Having performed his obligation under the forward G H I

A contract, the exporter is still owing the bank USD100,000 that was advanced on the bill. This will be settled when, on the maturity date of the bill, the bank collects USD100,000 from the exporter's overseas customer for the goods. That is the exporter's money which the bank will then use to settle the advance of USD100,000.

B It is the bank's contention that the company entered into forward contracts with the bank to provide a hedge against any depreciation in the foreign currencies concerned at the time when the company should receive advances in foreign currency from the bank on the presentation of the company's bills, so that they would get, even though the foreign currency should depreciate, the expected amount of Malaysian Ringgit for the C advances in foreign currency given by the bank on the bills.

In the case of the transactions between the company and the bank, however, not only, as I have said, was there no legal nexus between a forward contract and a BEP transaction, there was also no link of discharge or satisfaction between a particular forward contract and a particular bill, that is to say, it was not the case that the company would sell, in the D discharge of a particular forward contract, foreign currency that was to be derived from a particular bill. As the bank says in para 9(a) of their affidavit dated 30 May 1999 in Suit 272. '... the amount of the forward contracts do not need to correspond with any particular bill'. In the case of the sixteen forward contracts on which the bank is claiming losses from the company, E the bank does not know which, or how many, bills there might be that if presented would produce the amount of foreign currency that could be sold in satisfaction of the forward contracts. The bank's counsel admitted that there was no express agreement that the company should honour the forward contracts by presenting bills to the bank. I would say that what was needed to honour a forward contract was for the company to sell the F contracted amount of foreign currency on the maturity date. It should not matter where the money came from. As I have said, the company had also been making direct remittances. In fact in para 9(c) of their affidavit dated 10 March 1998 in the 272 suit, the bank says this:

> G It was agreed between the (company) and the (bank) that the (company) was permitted to meet its obligations under the forward contracts as and when the same fell due by the (company) presenting to the (bank) the (company's) bills for the purpose of the (bank) negotiating the same and/or collecting the proceeds of the same.

The word 'permitted' in that paragraph signifies that the presenting of bills for meeting forward contracts was a manner of meeting forward contracts H that was acceptable to the bank but was not obligatory on the company.

It is the bank's case that at about the time that the company ceased to perform the forward contracts they ceased to present bills to the bank. That in itself was no sin. The company was not bound to utilize the BEP facilities. But because the company had ceased to present their bills to the bank, the I bank was deprived of their regular source from which to satisfy the outstanding forward contracts.

So by their present application — encl (3) in suit 389 — the bank seeks several orders pertaining to the company's bills. The first order is to require

the company to present all their bills for collection by the bank and the proceeds to be appropriated towards settlement of the bank's losses on the forward contracts (RM13,346,467.20 plus interest), but should the bills have been collected by other financial institutions, the proceeds therefrom should be paid to the bank towards settlement of the same. The second order is an alternative order that the company be restrained from presenting their bills to other financial institutions until final disposal of 'the proceedings herein'. The third order is for disclosure of particulars of all of the company's bills.

If the first two orders were granted and obeyed, the bank would be assured of the settlement of their claim or part of it. Counsel for the company took it higher, saying that the bank would obtain a complete remedy on this application, although their suit has not been adjudged.

As to the third order sought, it has not been explained, and I do wonder, what legal advantage the bank could or intend to resort to after securing information as to the particulars of bills.

The question that has posed the greatest difficulty for me with the bank's application is whether, even assuming that the company is liable for the losses claimed on the outstanding forward contracts, there is legal justification or authority for granting the injunctive orders sought. It is clear from the nature of the orders sought that the bank takes the attitude that, until their losses on the outstanding forward contracts are paid, they have a right to the proceeds from all exports by the company. That is the effect of seeking to compel the company to present all their bills to the bank for collection of the proceeds which will be appropriated towards settlement of the bank's forward contract losses and, particularly, to compensate the bank in respect of proceeds from bills collected by other financial institutions. The effect of granting the orders would be as though the company had given a guarantee that proceeds from all their exports shall be used first to settle all outstanding forward contracts.

There was of course no such guarantee or any agreement or understanding to that effect. The bank's case is simply that the company must continue with their past conduct and that since in the past forward contracts had been performed in the majority of cases through the presentation of bills, the company must continue to present their bills to the bank. Their counsel put it as maintaining the status quo, but the effect of it is to compel the company to settle, or secure payment of, the bank's claim before it is adjudged.

The bank's counsel has not identified or suggested the principle of law by which the bank could insist that the company continue with their past conduct. None of the authorities cited in support of the injunctive orders sought has been of any assistance.

The passage at p 140 C–D of *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] 1 AC 130 is only about determining the relevant point in time for the question of preserving the status quo or the existing state of affairs in the granting of an interlocutory injunction; that is to say, the status quo or the existing state of affairs as existing when?

A The passage at pp 346 and 347 of *Astro Exito SA v Southland Enterprise* [1982] 3 All ER 335 discusses the question of granting an interlocutory injunction to enforce a contractual obligation in the light of the principle that there is an unlimited power of granting an interlocutory injunction 'where it would, according to sufficient legal reasons or settled legal principles, be right or just to do so'.

B *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670 is concerned with the question of balancing of injustice in granting or not granting an interlocutory mandatory injunction.

TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd [1985] 2 MLJ 45 is about granting an interlocutory mandatory injunction to enforce a C contractual obligation.

Aspatra Sdn Bhd & Ors v Bank Bumiputra Malaysia Bhd [1988] 1 MLJ 97 is about Anton Pillar orders.

Those cases are of no assistance because what I need to see is the legal justification for insisting that the company continues their past conduct by D presenting their bills to the bank when there is no contractual obligation to do so.

In my judgment, I ought not to grant the injunctive orders sought unless there is at least an arguable case that the bank is entitled to expect that so long as there are outstanding forward contracts the company will present all their bills to the bank. There is, however, no such arguable case. E The bank has not said as much. The bank has not said that they agreed to enter into forward contracts with the company in the belief or on the understanding that the company would continue to present their bills to the bank.

I dismiss the bank's application with costs.

F I turn now to the company's case. Their case is primarily that all the forward contracts that they entered into were invalid and not binding on them and therefore they are not liable to the bank for the losses the bank has incurred on the outstanding forward contracts.

One ground relied upon by the company for saying that the forward G contracts were invalid is that they entered into the forward contracts after being influenced by certain representations made by the bank to them in order to persuade them to enter into the forward contracts. As a result of the representations, they mistakenly believed that forward contracts were a part of BEP transactions. This is alleged in para 14 of their affidavit dated 16 February 1998 in suit 272. I quote the paragraph in full:

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> Saya sesungguhnya percaya dan mengatakan bahawa untuk mempengaruhi (company) supaya membabitkan diri ke dalam transaksi-transaksi Forex dan FFEX tersebut yang adalah amat berbeza dari apa yang (company) telah dahulunya bersetuju di bawah perjanjian bagi kemudahan kredit BEP tersebut (sebagaimana yang dirujuk di dalam perenggan 11 di atas); (bank) di antara 2 Julai 1996 dan 11 Julai 1996 telah membuat berbagai representasi melalui I Timbalan Presidennya Mr Liew Nam Lon dan juga melalui Penolong Pengurus (Bahagian 'Treasury') Cik Yvonne Low Wai Leng, kepada yang mana (company) telah bergantung, telah tersilap percaya dan salah anggap

bahawa transaksi-transaksi Forex dan FFEX adalah sebahagian daripada transaksi-transaksi BEP.

In para 6 of their affidavit dated 23 March 1998 in Suit 272 the company alleges that the representations were made to their managing director and the representations were that forward contract transactions were a part of BEP transactions.

The bank denies the allegation and maintains instead that it was the managing director of the company, who is the second plaintiff in the company's suit 272, who had approached the bank in January 1996 to request the bank to enter into forward contracts with the company. Consequently, the company had been entering into forward contracts with the bank throughout 1996 and 1997. See paras 7 and 8 of the bank's affidavit dated 10 March 1998 in suit 272. The fact that forward contracts had been entered into by the company since January 1996 is borne out by confirmation notes exhibited to the said affidavit as exh UOB-3A.

There are, in para 14 of the company's said affidavit dated 16 February 1998, certain things said or unsaid that serve as a caution to be careful about accepting the allegation in that paragraph as true. Firstly, the exact circumstances under which the alleged representations were made are not stated. Several questions arise. Were the representations made by telephone or in a meeting? What was the occasion? Did the two named persons make the representations together at one time or separately and at different times? It would have been unnatural for them to have made the representations together at one time. If they had made them separately and at different times, it would have been like a sustained effort. Did it not arouse the suspicions of the managing director? The representations are said to have been made over a period of nine days. How many times were they made? Was the managing director so uninformed as to believe that forward contracts were a part of BEP transactions? Did he not ask what would happen to BEP transactions if the company did not enter into forward contracts, considering that the company had entered into BEP transactions since 1995? I cannot believe that the managing director, if the bank's officials had simply told him that forward contracts were a part of BEP transactions, would have been so naïve as to feel obliged to enter into forward contracts without any warning as to what would happen to BEP transactions if no forward contracts were entered into.

Then there is the consideration that the company could not have entered into forward contracts in consequence of the representations made, as alleged by the company, between 2 July 1996 and 11 July 1996, because they had been entering into forward contracts even before that, ever since January 1996.

The company argues that they did not need to enter into any forward contract because, as the name 'Bill of Exchange Purchased' suggests, the bank purchased a bill outright from the company, so that the money paid by the bank on the bill was purchase money and not an advance and there was no need for any forward contract to provide a hedge against any depreciation in foreign currency. I find that the contention of the company

A is not borne out by the terms of the arrangement between the company and the bank. Although one could argue that technically the money paid on a bill was purchase money, it was treated as an advance, as is borne out by the fact that the company had to give the 'Indemnity for bills facility' that I have already mentioned. If the payment was not an advance there would have been no necessity for the indemnity, which is the instrument that would B enable the bank to have recourse to the company should the bank be unable to collect payment on the bill from which to recover the amount they had paid to the company. Then there is the fact that the BEP facility agreements provided for the payment of interest and the furnishing of security. If the payment on a bill was not an advance there would have been no necessity C for charging interest and requiring the furnishing of security.

For those reasons I reject outright the allegation that the company entered into forward contracts as a result of false representations on the part of the bank.

The last forward contract entered into between the company and the D bank was dated 29 August 1997. There had been three letters of offer of BEP facility by the bank and these did not include any mention of forward contracts. On 20 November 1997, three months after the last forward contract, the bank issued a fourth letter of offer of BEP facility which included, for the first time, a forward contract facility which was set out as an increase to RM10m of an existing facility of RM5m. Although the E company and their two guarantors signed acceptance of the fourth letter of offer, they claim that they signed it under coercion and undue influence exercised by officers of the bank. Since, as I find it, the forward contracts in this case, which were all entered into well before the issuance and acceptance of the fourth letter of offer, were entered into, as the bank contends, voluntarily and at the wish of the company, the allegation that the F fourth letter of offer was accepted under coercion and undue influence is a red herring and is irrelevant and I need not enter into an examination of it.

Another ground relied on by the company for maintaining that they are not bound by the forward contracts is that they are illegal and unenforceable, being in violation of para 5 of the Exchange Control of G Malaysia Notice No 2 ('ECM2').

It is necessary to examine certain relevant provisions of the Exchange Control Act 1953.

The Act, in s 2(1), defines an 'authorized dealer', as far as a foreign currency is concerned, as 'a person for the time being authorized by an H order of the Controller to act for the purposes of this Act as an authorized dealer in relation to ... that foreign currency'. The authorization is by an order. The bank has been, at all material times, an authorized dealer in foreign currencies. See the Exchange Control (Authorized Dealers in Foreign Currencies and Authorized Depositaries) (No 2) Order 1995 (PU (A) 432/95) and the Exchange Control (Authorized Dealers in Foreign I Currencies and Authorized Depositaries) Order 1998 (PU (A) 265/98).

Section 4(1) provides, as far as a foreign currency is concerned, as follows:

> Except with the permission of the Controller, no person, other than an authorized dealer, shall, in Malaysia, buy ... any ... foreign currency from, or sell ... any ... foreign currency to, any person other than an authorized dealer.

The effect of s 4(1) is that a person needs the permission of the controller to buy or sell any foreign currency from or to any person who is not an authorized dealer, but a person who is an authorized dealer is exempted from the control of the provision by the words 'other than an authorized dealer', so that the bank, as an authorized dealer, does not need the permission of the controller to buy or sell any foreign currency from or to any person whether he is or is not an authorized dealer.

Section 39(1) regulates 'Any permission, consent or authority granted under this Act'. By para (a), it may be general; by para (c), it may be conditional; and by para (e), it 'shall be published in such a way as, in the opinion of the Controller, to give any person entitled to the benefit of it an adequate opportunity of getting to know of it, unless in his opinion publication is not necessary for that purpose'.

ECM2 is one of 16 ECMs issued on 1 December 1994. Paragraph 2 of the preamble to the 16 ECMs says that they were issued pursuant to s 39 and that they embody the 'general permissions' and directions of the Controller of Foreign Exchange. Paragraph 1 of the preamble sets out what appears to be the premise on which the ECMs were issued, which is that the Act 'prohibits all dealings and transactions falling within the purview of the Act, unless the permission of the Controller ... is obtained'. It is a general statement and, as such, is inaccurate because it does not take account of exceptions such as that given by s 4(1), whereby, once a person is authorized by order of the Controller as an authorized dealer, he does not further need the permission of the Controller to buy and sell foreign currency from or to anybody.

Paragraph 5 of ECM 2 is subject to several provisos, but I shall quote it with only proviso 5.1.1:

> The Controller hereby gives permission to an authorized dealer to buy forward foreign currency from a non-Bank resident against Ringgit or foreign currency held in a permitted foreign currency account, provided —
>
> 5.1 The authorized dealer is satisfied that the non-Bank resident is due to receive foreign currency —
>
> 5.1.1 From a non-resident for the export of goods or services or merchanting trade; or.

It can be seen that, consistently with the inaccurate premise in para 1 of the preamble to the ECMs, the controller, by para 5, is giving 'permission to an authorized dealer to buy forward foreign currency' and attaching conditions to the grant of permission.

Since the permission is a general permission purportedly given under s 39, and since s 39 is concerned with permissions granted under the Act, the question that arises is under what provision of the Act is given the permission that para 5 purports to give. As far as I can see, it can only be under s 4(1), but, as I have said, an authorized dealer is exempted from the

control of that section and therefore the giving of permission to an authorized dealer is not authorized by the section. It follows that conditions attached to the granting of the permission are also not authorized by the section and are therefore ineffective and unenforceable.

The company contends that when entering into the forward contracts the bank failed to satisfy the condition in para 5.1.1 of ECM2 which requires them to be 'satisfied' that the company was due to receive foreign currency for the export of goods. The company contends that the bank could not be so satisfied except upon actual production by the company of export documents.

The bank contends that the subjective test must be applied to determine whether they were so 'satisfied' and that they were in fact satisfied that the company was an exporter due to receive foreign currency for their exports because since 1994 the company had consistently been presenting their bills to the bank and had performed forward contracts until October 1997. In other words the bank claims they were so satisfied from the past performance record of the company.

The controller of foreign exchange has given conflicting views through different officers. By his letter dated 11 April 1998 to the company's solicitors, he said that the bank must be satisfied by 'actual export documentary evidence'. By his letter dated 29 April 1998 to the bank, he said the contrary. I quote para 2 of the letter:

> We write to confirm that the word 'satisfied' in para 5. 1 of ECM2 does not mean that, prior to entering into the forward exchange contract, the bank has to sight the actual export documentary evidence. The bank may use whatever methods deemed appropriate to satisfy itself that a non-bank resident is due to receive foreign currency. The bank, in granting the foreign exchange line to a client would have established that the client has foreign currency receipts in its normal course of business. We note that for practical reason, the bank would not be able to sight documents prior to entering into the forward contract since forward deals are done over telephone conversation.

The point about the meaning of 'satisfied' is only relevant if I am wrong in my opinion that para 5 of ECM2 is ineffective and unenforceable. I think what the company contends is that, in respect of a particular forward contract, the bank must be satisfied from a particular bill that the company was going to receive from that particular export the foreign currency that they agreed to sell to the bank by that forward contract. In my opinion the words of para 5.1 do not support the argument for such a strict bill-to-forward-contract monitoring of the receipt of foreign currency on the part of the company, because in the phrase 'due to receive foreign currency', the foreign currency is at large and is not identified or specified by reference to the foreign currency that is bought or to be bought. Paragraph 5 must be strictly construed if, as is contended by the company, failure to satisfy the condition is an offence under the Act. If the intention of para 5.1 was, as contended by the company, that the bank must be satisfied from the actual production of the related bill, it would have said so. Paragraph 5.1 not being specific as to the basis for being 'satisfied', there would be no justification

for construing the provision as requiring a specific basis for it. In my opinion, therefore, the test to be applied is a subjective one, as is implied by the controller in his letter dated 29 April 1998, and there was, therefore, no failure on the part of the bank to be so satisfied as contended by the company.

Even assuming that the bank had not been satisfied as required by para 5.1.1, in my opinion that would not affect the validity of the forward contracts entered into. There could only be two consequences in law of the failure to be so satisfied. One is that the permission was still given and was still in force, although the bank might have committed an offence under para 7(1) of the Fifth Schedule to the Act of failing 'to comply with any restriction or requirement imposed ... under this Act'. In that case, since the permission endured, the forward contracts entered into were valid. The other consequence is that the permission given would not have taken effect to cover the forward contracts entered into, so that in effect there was no permission in regard to them. In that case, s 36 would have a bearing on the question. Subsection (1) provides as follows:

> It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the Controller is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required:
>
> Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of this Act or for any other reason.

The effect of that subsection on the forward contracts in this case is that, although the absence of permission would otherwise have impeded or excused the performance of the term as to buying on the part of the bank, the subsection, by virtue of the proviso, would not apply as it would have been inconsistent with the intention of the parties that it should apply, because since, in the past, forward contracts between the bank and the company had been performed without regard to compliance with para 5.1.1 of ECM 2, they must have contemplated the performance of that term for all Forward Contracts in despite of the Act.

The company refers to s 2(b) of art VIII of the Bretton Woods Agreements, which provides, in part, as follows:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member ...

They say that that Agreement, and therefore that section, has been adopted by the Bretton Woods Agreements Act 1957 (Act 472), but I do not see any provision in that Act that adopts that Agreement.

I find there is no serious question to be tried as to the validity of the forward contracts and the company is therefore not qualified for the injunctive orders that they seek by their application in encl (4) of Suit 272.

A In any event, the orders sought by the company are entirely unnecessary in the light of the known, indisputable circumstances. The first order has been abandoned with the abandonment of the company's stand that the forward contracts were entered into by the bank on behalf of the company without the company's knowledge.

B The second order is an order to restrain the bank from freezing the company's BEP facilities. The order is unnecessary because the company has ceased to present bills to the bank, and presumably does not intend to do so in the future or they would not have opposed the bank's application.

The third order is to restrain the bank from debiting or crediting the company's current account with amounts lost or realised on forward C contracts. The company's current account has no money in it. The bank will not be able to recover their losses even if they were to debit the company's current account.

The fourth order is to restrain the bank from exposing or giving information on the company and the two guarantors to financial D institutions, or blacklisting them. I agree with learned counsel for the bank that the matter ought to be left as a matter for observance under the Banking and Financial Institutions Act 1989, particularly Part XIII.

I dismiss the company's application with costs.

Order accordingly.

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Reported by Jafisah Jaafar

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